STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

RALPH ORMSBY and KIMBERLY ORMSBY,

Plaintiffs - Appellees,

SC: 123287; 123289
COA: 233563
Oakland CC: 98-008608-NO

v.

CAPITAL WELDING, INC., an Ohio Corporation, and MONARCH BUILING SERVICES, INC., an Ohio Corporation,

Defendants - Appellants.

Neil A. Miller (P25645)
Attorney for Plaintiffs
2301 W. Big Beaver Rd.
Suite 318
Troy, MI 48084
(248) 649-0211

Patrick Burkett (P33397)
Of Counsel for Plaintiffs
SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, PC
2000 Town Center, Suite 900
Southfield, MI 48075-1100
(248) 355-0300

Michael M. Wachsberg (P28646)
Attorney for Defendant Monarch
4057 Pioneer Drive, Suite 300
Commerce Twp., MI 48390
(248) 363-6400

Joseph J. Wright (P41289)
Attorney for Defendant Capital
29777 Telegraph Rd, Suite 2500
Southfield, MI 48034
(248) 827-3834

F.R. Damm (P12462)
Paul C. Smith (P55608)
Attorneys for Michigan Manufacturers Association
CLARK HILL, PLC
500 Woodward Ave., Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

Nicholas R. Nahat (P49802)
Attorneys for Michigan Regional Council of Carpenters
NOVARA, TESIJA & McGUIRE, PLLC
2000 Town Center, Suite 2370
Southfield, MI 48075-1314
(248) 354-0380

BRIEF OF *AMICUS CURIAE* MICHIGAN REGIONAL COUNCIL OF CARPENTERS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES — PAGES

OTHER

STATEMENT OF THE QUESTION PRESENTED

Are the "retained control" and the "common work area doctrine" separate and what is the scope of each doctrine?

- The Court of Appeals held that the doctrines are separate in accordance with a long line of Michigan law, and was not required to completely address the "scope" of each doctrine as part of its decision.

- The Defendant-Appellant Monarch Building Services, Inc., answered that the doctrines are separate; that "retained control" doctrine with distinct elements operates irrespective of whether the entity is an owner, general contractor, or subcontractor; that the "common work area" doctrine has application only to general contractors in accordance with *Funk* and its progeny.

- The Defendant-Appellant Capital Welding, Inc., answered that the doctrines are not separate and that a common work area is a necessary element of the retained control doctrine, which itself is limited to situations where a subcontractor assumes the duties of a general contractor.

- The Plaintiff-Appellees answered that the doctrines are separate; that the Court of Appeals correctly applied the common work area doctrine with regard to the general contractor, and did not apply it to a non-general contractor; and that the retained control doctrine is a discrete basis of liability against a subcontractor to the general contractor.

- The *amicus curiae* Michigan Manufacturers Association contended that the *only* basis for imposing direct tort liability on a general contractor is the "common work area doctrine;" that doctrine may also be applied to an owner, however, an owner's retained control over the general contractor is a separate requirement necessary to impose "common work area" liability on that entity.

- The Michigan Regional Council of Carpenters ("MRCC") answers that the doctrines are separate in accordance with the Court of Appeals, the Appellant Monarch Building Services, Inc., and Appellees; the "common work area doctrine" is applicable to general contractors in accordance with Plaintiff-Appellees and Defendant-Appellant Monarch Building Services, Inc.; and that the "retained control" doctrine is properly applicable to owners in accordance with settled Michigan law in the

construction context, but also operates irrespective of whether the entity is an owner, general contractor, or subcontractor.

INTRODUCTION

The matter before this Court, the separation of the "retained control" and "common work area" doctrines, concerns the settled rights and protections of tens of thousands of Michigan citizens working in the building and construction trades, which this Court should be loathe to disrupt through intemperate judicial activism. At most, a restatement of the doctrines as they have been elaborated may be necessary in light of the extensive jurisprudence which has been developed in this area.

The beginning and end of the Court's analysis, all parties agree, is *Funk v. General Motors Corp.*, 392 Mich 91; 220 NW2d 641 (1974). The long and intricate elaboration of *Funk* by the Courts of this State has been neither disparate nor confusing, but has simply applied the doctrines in light of the unique facts and circumstances of those cases which warranted further explanation. The issue is not, as Appellant states, that these "rules are not applied in the same manner to all parties," but rather whether the rules are applied in the same manner in the same type of case—the differing circumstances underlying different cases will obviously require a different application of the doctrines. For example, in the instant case, the Appellants urge the Court of Appeals to rely upon a "single isolated incident" as the basis for its decision

that the retained control theory has merit. First, this is not the case as detailed in Appellees' Brief (Brief, at pp.15-16), and, second, all parties agree Michigan case law does not support a "single isolated incident" as giving rise to retained control liability. When viewed in this light, the Court of Appeals decision is hardly a "confusing manifestation" of "inconsistent treatment" (Appellant's Brief, p. 1) but rather the consistent application of a coherent doctrine. This example suggests that, fundamentally, there should be no disagreement about how *Funk* has been elaborated, but only its application in particular circumstances. Because the doctrines are coherent and well settled, a restatement of their evolution is scarcely required.

While the instant Court of Appeals decision represents the latest in a long, coherent elaboration of *Funk* and its progeny, and would serve well as the basis for a potential restatement of that line, among the most extreme positions set forth to this Court is that of the Appellant Capital Welding and the Michigan Manufacturers Association, which sets forth an idiosyncratic view of *Funk's* development, and an interpretation which is inconsistent not only with Michigan law in urging that retained control theory only apply to a general contractor, and only, *inter alia*, in a common work area, but also is inconsistent with other jurisdictions that have adopted the theory. Adopting those conclusions would therefore be both a breathtaking exercise of judicial activism and

transform Michigan's jurisprudence in this area into an odd curiosity.

In sum, this long elaboration upon which the public and tens of thousands of Michigan citizens in the building trades, contractors, insurers, and related parties, have relied upon for over a generation has been accomplished in the spirit of the policy reasons behind this Court's precedent. At most, therefore, a restatement of that venerable and elaborate line may be useful.

STATEMENT OF FACTS

The MRCC adopts the factual statements set forth in the parties' briefs and in the decision of the Court of Appeals.

ARGUMENT

1. Introduction and Summary.

Per this Court's November 6, 2003 Order, this Brief address the issue of the relationship of the retained control doctrine and the common work area doctrine, and their scope. Contrary to the view of some, such as the Michigan Manufacturer's Association, the MRCC finds neither that this is a "confused area of law" nor that the Court of Appeals' decision is "vague."

Under *Funk, supra*, with regard to the common work area doctrine, a general contractor is legally responsible to implement safety procedures in common work areas. This was further

elaborated in four elements comprising the common work area theory: first, a general contractor with supervisory and coordinating authority over the site; second, a common work area shared by the employees of more than one subcontractor; third, a readily observable and avoidable danger in that common work area, and; fourth, creating a high degree of risk to a significant number of workers.

Second, with regard to the retained control doctrine, the elements are related, but separate, from common work area liability, the standard being that a landowner may be held liable for personal injuries arising out of the negligence of its independent contractor where the landowner maintained control over the manner in which the contractor performed the work to the extent that the contractor was not entirely free to do the work in his own way.

In sum, two distinct doctrines were elaborated in *Funk*, with two different bases of recovery.

2. The current state of the law regarding "retained control" is coherent and not "vague."

A. "Retained Control" and Liability of the Owner *et al.* in the Law.

The general rule is that an owner, i.e. landowner, is not liable for personal injuries arising out of torts committed by an independent contractor retained to do work on its premises. *Funk v General Motors Corp*, 392 Mich 91, 101 (1974); *Wolfe v The Detroit*

Edison Co, 156 Mich App 626, 627 (1986), *lv den* 428 Mich 865 (1987); *Miller v Great Lakes Steel Corp*, 112 Mich App 122, 125 (1982). The rationale of this rule is that an independent contractor is not under the control of the landowner and, therefore, the landowner should not be held vicariously liable for the negligence of the independent contractor. *Hartford Fire Insurance Co v Walter Kidde & Company*, 120 Mich App 283, 294 (1982).

However, there are four major exceptions to this rule under which an owner may be held liable for personal injuries arising out of an independent contractor's negligence: first, when the landowner *retained control* over the manner in which the contractor performed the work; second, when the landowner negligently hired the independent contractor; third, when the independent contractor was involved in inherently dangerous activities; and fourth, when the owner had exclusive possession and control over the premises and breached the duty of care owed to the invitees upon the premises. Besides these four major exceptions, there are others. *See* Restatement of Torts, 2d, §§ 410-429. It is, obviously, the first doctrinal exception which is of interest to this Court here.

With regard to this "retained control" exception, it is settled that an owner may be held liable for personal injuries arising out of the negligence of its independent contractor if the

owner maintained control over the manner in which the contractor performed the work to the extent that the contractor was not entirely free to do the work in his own way. Restatement of Torts, 2d, § 414. This is the general rule recognized in *Funk*. However, an owner who has merely a *general* right to order the work stopped or resumed, to oversee its progress or to receive reports, to make suggestions or recommendations, or to prescribe alterations or deviations has not retained control. *Id.* In accordance with the Restatement 2d, Michigan courts have repeatedly recognized that some control by the landowner is necessary in order to protect its contractual rights and ensure that the project complies with job specifications; however *partial* control, or as Appellant characterizes it in its brief, a "single isolated incident," does *not* subject the owner to liability for injuries arising out of an independent contractor's negligence unless the owner retains the right to partially control the *actual* construction work. *Miller v Great Lakes Steel Corp*, 112 Mich App 122, 126-127 (1982). This is hardly incoherent or "confusing."

In addition to a landowner, the MRCC joins with Appellant Monarch in its interpretation that the "retained control" doctrine with distinct elements operates *irrespective* of whether the entity is an owner, general contractor, or subcontractor. (See Appellant's Brief, pp. 19-26) As is suggested by case law in that discussion, it stands to reason that it is not only the owner that

can retain control and thereby earn an exclusion from the general rule of nonliability, but general contractors or subcontractors as well. Indeed, any entity that entrusts work to another, but who retains control of part of the work, is subject to liability for damages to others for whose safety that employer owes a duty of reasonable care, which is caused by a failure to exercise such care, and is not otherwise obviated by law.

B. "Common Work Area" Doctrine and General Contractor Liability in the Law.

A general contractor on a construction project assumes the potential liability of the landowner if the landowner surrenders possession and control to the general contractor. As discussed below, there are four major areas of liability: first, when the employee of the subcontractor is injured in a common work area; second, when the general contractor has negligently hired the subcontractor; third, when the project involves inherently dangerous activities; and, fourth, when the general contractor has possession and control over the premises, including the area in which the subcontractor's employee is injured. It is, obviously, the first doctrinal exception which is of interest to the Court.

A general contractor's duty to employees of its subcontractors is to "assure that reasonable steps within its supervisory coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a

high degree of risk to a significant number of workmen." *Funk v General Motors Corp*, 392 Mich at 104. The rationale behind this exception to nonliability is that the general contractor is in the best position to implement and oversee proper safety precautions in common work areas. *Erickson v Pure Oil Corp*, 72 Mich App 330, 334-335 (1976), *lv den* 400 Mich 859 (1977) (citing *Funk*, *supra*, at 104).

This Court in *Funk* established a four-part test for general contractor liability under the common work area doctrine:

(1) A readily observable, avoidable danger;

(2) in a common work area;

(3) which involves a high degree of risk;

(4) to a significant number of workers.

Erickson, 72 Mich App at 335 (citing *Funk*, *supra*).

The common work area exception is based on the fact that there is a significant distinction between a premises owner who hires a contractor to do work on its premises and a general contractor engaged in the construction business hiring a subcontractor to do work on a construction project. As stated by this Court in *Funk*:

> In contrast with a general contractor, the owner typically is *not* a professional builder. Most owners visit the construction site only casually and are not knowledgeable concerning safety measures....Supervising job safety, providing safeguards, is *not* part of the business of the typical owner. *Funk*, 392 Mich at 104-105 (emphasis *supplied*).

This seminal case has been the beneficiary of extensive important elaboration. For example, as to the second element of the four-part test, Michigan courts have defined "common work area" as an area in which two or more subcontractors will eventually work. *Erickson*, 72 Mich App at 337. Therefore, two or more subcontractors need not actually be working in the same area simultaneously in order for that area to qualify as a common work area under this exception to nonliability. *Id.* In *Funk v General Motors Corp*, *supra*, the injured plaintiff was one of many tradesmen working at the construction site. The plaintiff had hung six-inch piping from steel beams on an addition to a General Motors plant. He was then ordered to move six hundred feet of the piping and climbed onto the beams to do so. He then proceeded onto the roof and was injured when he lost his balance and fell more than thirty feet to the ground. This Court concluded that the general contractor was liable for the plaintiff's injuries:

> [E]ven though Funk fell from the roof, and not the beams, the jury could properly conclude that the failure to provide any safety equipment anytime anywhere for men working over thirty feet above the ground was the cause in fact of Funk's *injuries*. *Funk*, 392 Mich at 115-116 (emphasis not supplied).

In *Erickson v Pure Oil Corp*, *supra*, the Court of Appeals reversed the trial court's decision to grant summary disposition in favor of the defendant general contractor, finding that there was sufficient evidence to go to the jury on the question of whether the general

contractor was liable under the common work area doctrine. The plaintiff in *Erickson* was employed by a subcontractor to assist in the erection of an office-warehouse building. Once the frame of the building was in place, the crew began installing corrugated metal sheeting on the roof. This sheeting was covered with a light oil which caused the crew to slip and slide on the roof. The plaintiff was carrying some materials on the roof when he lost his footing and fell approximately twenty feet onto a concrete apron. The Court of Appeals concluded that the trial court erred when it ruled as a matter of law that the plaintiff's injuries did not occur in a common work area because the building was located away from the construction site:

> Our decision herein does not represent a dramatic change from the *Funk* limitations. That opinion continually stands as a touchstone of public policy considerations. *Funk v General Motors Corp*, *supra* at 104, *Yoakum v Practical Home Builders, Inc*, 55 Mich App 384, 388; 222 NW2d 251 (1974), *lv den*, 394 Mich 901 (1975). By holding that a jury may find liability for a supervising general contractor, even though its subcontractors may work on the steel frame structure one at a time, we do not substantially deviate from the sound public policy restrictions of *Funk*. *Erickson*, 72 Mich App at 337-338.

In *Plummer v Bechtel Construction Co*, 440 Mich 646 (1992), this Court reversed the decision of the Court of Appeals and reinstated the judgment entered by the trial court on a jury verdict in favor of the plaintiff against Detroit Edison as the landowner and against Bechtel Construction Company as the general contractor on a construction site. The plaintiff was injured when he fell from a

work platform at the construction site due to the fact that the guardrails had been removed from the platform for at least two weeks before the accident. Although the plaintiff was wearing a safety belt and a standard three or four foot long lanyard, he had not tied himself by his safety rope. The Court concluded that the general contractor was liable under the common work area doctrine, because all four elements of the *Funk* test were satisfied.

As *Plummer* sets forth and elucidates, the common work area formulation was an effort to distinguish between a situation where employees of a subcontractor were working in isolation from employees of other subcontractors and a situation where employees of a number of subcontractors were working in the same work area; the common work area formulation did not contemplate a quilt work of common and noncommon work areas. Again, this doctrine has been the beneficiary of extensive elaboration, but is hardly "inconsistent" in its application by Michigan courts.

C. The bases of "confusion" of the two doctrines are only apparent, not real.

A single decision only can be cited as generating doctrinal "confusion" in this area, which is *Candelaria v BC Contractors*, 236 Mich App 67; 600 NW2d 348 (1999). For the reasons cited in Plaintiff-Appellees' brief, which with which at least Plaintiff Appellant Monarch concurs in part, *Candelaria* was poorly reasoned. (Appellees' Brief, p. 20-23) A single case in thirty years does

not create a crisis of inconsistency. In fact, the soundness of the retained control doctrine can be found in the river of decisions which have been able to apply the principles consistently and without confusion, both finding retained control in some circumstances, and not finding such control in others. *See, e.g. Samodai v Chrysler Corp,* 178 Mich App 252 (1989), lv den 433 Mich 877 (1989); *Miller v Great Lakes Steel Corp,* 112 Mich App 122 (1982); *Muscat v Khalil,* 150 Mich App 114 (1986). (Cases in which "retained control" was not found.) *See also Phillips v Mazda Motor Mfg.,* 204 Mich App 401 (1994); *Burger v Midland Cogen,* 202 Mich App 310 (1993); *Warren v McLouth Steel Corp,* 111 Mich App 496 (1981), lv den 417 Mich 941 (1982); *Dowell v General Telephone Company of Michigan,* 85 Mich App 84 (1978). (Cases in which "retained control" was found.) Thus, there has been very little "confusion" in applying the doctrine.

Similarly, the Michigan Manufacturers' Association ("MMA") claims the *Ormsby* Court is confused on account of the "vague and undefined nature" of retained control liability. (Brief, p. 4) However, as indicated above, the courts have coherently applied this doctrine. The MMA asks rhetorically, how much control is enough? Again, this question has been decisively answered.

As was indicated *supra*, in accordance with the Restatement 2d, Michigan courts have repeatedly recognized that some control by the

landowner is necessary in order to protect its contractual rights and ensure that the project complies with job specifications; however *partial* control, or as Appellant characterizes it in its brief as a "single isolated incident," does *not* subject the owner to liability for injuries arising out of an independent contractor's negligence unless the owner retains the right to partially control the *actual* construction work. *Miller v Great Lakes Steel Corp*, 112 Mich App 122, 126-127 (1982). The degree of control which is enough is obviously a question of fact and circumstance which varies from case to case.

Similarly, another question the MMA is "prompted to ask" -- i.e. whether an "independent contactor" can remain "independent" while under the employer's "control"--is a metaphysical canard. (MMA Brief, p. 5) First, the findings on each common law factor used for testing employee status are factual, while the ultimate conclusion as to whether an individual is an independent contractor or an employee is a conclusion of law. As *Miller, supra*, makes clear, control or retaining the right to partially control is the key issue, and actual control over an independent contractor is a *separate* issue, which the MMA conflates, and even if the type of control was identical, that factor is only one of *many* which bear on employee/independent contractor status. (In fact, comments a. and c. of Section 414 of the Restatement 2d makes clear that the control envisioned stops short of that necessary to establish

agency, hence, not implicating master-servant doctrine.) Again, this is a fact-intensive inquiry, but hardly incoherent or "confusing." In sum, there is no need for the "clarity" which the MMA advocates and desires. Only *Candelaria* poses the risk of upending doctrinally settled questions.

3. Adding a "common work area" element to the retained control doctrine would be a radical jurisprudential departure.

A brief sampling of other jurisdictions demonstrate that no sister court has interpreted "retained control" doctrine as having a "common work area" element as a *sine qua non* for recovery. *See, e.g., Thompson v. Jess*, 979 P.2d 322, 327 (Utah 1999); *Lewis v Riebe Enters., Inc.*, 825 P.2d 5, 9 (Ariz. 1992); *Corsetti v The Stone Co.*, 483 N.E.2d 793, 798 (Mass. 1985); *Martinson v Arco Alaska, Inc., Lee Lewis Construction, Inc. v Harrison*, 2000 WL 33666911 (Tex. Dec 20, 2001); *Hooker v Department of Transportation*, 27 Cal4th 198 (Cal 2002); *Larsen v. Commonwealth Edison*, 33 Ill2d 316, 211 NE2d 274 (Ill 1965). Integrating the two different doctrines would thereby create a strange hybrid that would not only generate more confusion than clarity, but also put Michigan squarely outside the nation's considered jurisprudence on the issue.

4. Workplace Safety is the Keystone.

The proper understanding of the *Funk* case lies in the evils it addressed, which is negligence in the arena of workplace safety.

First, *Funk* realized that in the nature of the construction site it is the general contractor's supervisory and coordinating authority where ultimate responsibility for job safety is placed in a common work area. *Funk, supra*, p. 104. The key issue is workplace safety, which is often in such cases outside the purview of a subcontractor; thus, a worker does not earn a windfall of a double recovery under Funk "from two different masters on two different theories." (MMA Brief, p. 15) *Funk's* common work area tort liability rises from this Court's recognition of the realities of safety on modern jobsites in that case, not master-servant doctrines.

The master-servant doctrines on which the MMA relies pertain to the area of worker's compensation, which is not in issue here. The legal theory supporting such exclusive remedy provisions is a presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. The function of the exclusive remedy provisions is to give efficacy to the theoretical "compensation bargain." In this instance, there is *no* such apparent "bargain" with the owner of a property who retains

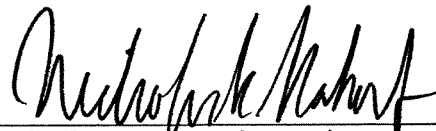
control as to certain work, or with a general contractor that may be responsible for avoidable dangers in a common work area under the required circumstances. These are theories of recovery *outside* the worker's compensation scheme which promote workplace safety, and *not* worker's compensation.

CONCLUSION

The doctrines at issue are separate. Unifying the doctrines and undertaking the sweeping re-interpretation which the MMA advocates would be an intemperate exercise of judicial activism. This Court should affirm *Funk* as it has been elaborated for over a generation and its latest discussion in *Ormsby* as consistent with that jurisprudence. Thousands of Michigan citizens have relied on this cornerstone of law in order to help ensure workers' safety. Owners, contractors, and insurers alike are entitled to the stability of the "common work area" doctrine. Likewise, the "retained control" doctrine is a venerable theory which even predates *Funk*, and affects any person subject to its elements, although it is most often realized in the construction context at issue here. In this context, the doctrine obviously exists outside the worker's compensation scheme since it applies to an owner, not an employer and has been, again, a well-settled issue for over a generation, which this Court should take care not to disrupt.

Respectfully submitted,

NOVARA, TESIJA & McGUIRE, P.L.L.C.

By: 

Nicholas R. Nahat (P49802)
Attorney for Michigan Regional
Council of Carpenters
2000 Town Center, Suite 2370
Southfield, Michigan 48075-1314
(248) 354-0380

Dated: February 4, 2004

W:\Old N Drive\FUNDS\mrcc\litigation\ormsby\pleading\ormsby.michigansupremecourtamicus.doc